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A Triumph of Myth over Principle: The Saga of the Montana Open-Range

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A TRIUMPH OF MYTH OVER PRINCIPLE: THE SAGA OF THE MONTANA OPEN-RANGE

Roy H. Andes*

"Oh give me lands,
Lots of lands under starry skies above,
Don't fence me in . . . "[1]

I. INTRODUCTION

Many city people—as well as full fledged Montana-borns—find part of Montana's charm in its wide open spaces. Cresting a hilltop by car, one may encounter a cowperson on horseback, a Kenworth tractor-trailer, a bull elk, or a pair of black angus heifers. By romantic tradition and to large extent by law, all have equal run of Montana's range. The "open range" tradition permits free-ranging livestock, limited only by fence-building or herding by persons who wish to exclude wandering animals. The word "free" is literal; the livestock-owner pays nothing for grazing other people's unfenced grass.

Most people assume that "open range" is the law of Montana.[2] The Supreme Court of the Montana Territory so held in *Smith v. Williams*.[3] Therein, the court concluded that damages caused by trespassing livestock may not be recovered unless the plaintiff had erected a statutory "legal" fence to fence out animals.[4] But that tradition may not well-serve modern Montana with high speed automobiles, growing population and increasing urbanization. This Article first surveys national range law, then compares the national trend to Montana's law. The Article concludes by assessing to what extent open range rules should remain part of Montana law.

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1. Lyrics by Robert Fletcher; melody by Cole Porter.

2. *See* Williams v. Selstad, 235 Mont. 137, 766 P.2d 247 (1988); State *ex rel.* Martin v. Finley, 227 Mont. 242, 738 P.2d 497 (1987); Siegfried v. Atchison, 219 Mont. 14, 709 P.2d 1006 (1985); Ambrogini v. Todd, 197 Mont. 111, 642 P.2d 1013 (1982).

3. 2 Mont. 195, 202 (1874).

4. *Smith*, 2 Mont. at 197-202 (interpreting the predecessor statute to MONT. CODE ANN. § 81-4-215 (1993)).

II. RANGE LAW NATIONALLY

A. In the Beginning—Mere Custom

An understanding of range law requires examination of its social and legal history. One scholar described the law of the range as the purest example of geographical circumstances determining legal rules.[5]

In contrast to the open range policy of the western United States, the common law of the range derives from England and requires the stock owner to restrain his livestock from running at large. Failure to restrain animals imposes strict liability for any damages caused by trespassing livestock. Such common law range rules apply in most jurisdictions, particularly the eastern states.[6]

However, by early custom in the West, the federal government allowed private individuals to gratuitously graze stock at large on federal lands. The practice was permitted because of the presence of "great plains and vast tracts of unenclosed land, suitable for pasture."[7] At the time, "[it] was reasoned that much of the land would be unused if farmers were required to limit grazing to areas enclosed with fences."[8] Nineteenth century ethics abhorred such "waste," so the western territories and newly admitted states generally continued the open range custom either by statute or judicial decision.[9] In 1894, the United States Supreme Court summarized as follows:

> As there are, or were, in the State of Texas, as well as in the newer [s]tates of the West generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle

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5. Bernhard Grossfeld, *Geography and Law*, 82 MICH. L. REV. 1510, 1515 (1984).

6. Light v. United States, 220 U.S. 523, 535 (1911); Buford v. Houtz, 133 U.S. 320, 326 (1890); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 76, at 538-41 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS, § 504 cmt. f (1977).

7. *Light*, 220 U.S. at 535.

8. Marsha K. Ternus, *Liability for the Escape of Animals*, 30 DRAKE L. REV. 257, 257 (1980).

9. *See* KEETON, *supra* note 6, at 540, text accompanying notes 21-22.

accidentally straying upon the land of others.[10]

The "open range" was mere custom—"an implied license"—unless embodied in state or territorial statutes.[11] The United States Supreme Court in 1911 described it thusly:

> And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for [open range]. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent.[12]

B. Range Law Becomes Statute

Range custom evolved into statutes when state and territorial legislatures began to enact legislation. The "open range" statutes in western states followed an almost identical pattern. Montana's statute provides:

> If any [livestock] break into any enclosure and the fence of the enclosure is legal, as provided in [another code section], the owner of the animals is liable for all damages to the owner or occupant of the enclosure. This section may not be construed to require a legal fence in order to maintain an action for injury done by animals running at large contrary to law.[13]

The First Territorial Legislature at Bannack enacted the Montana Open Range Statute in 1865. Today, its language remains substantially unchanged.[14] A later companion section defines "legal fence" as to height and spacing of posts and wires.[15]

The statutes of most other western states are substantively identical to Montana's, including Arizona, Arkansas, California, the Dakotas, Idaho, Illinois, Indiana, Kansas, Texas and Washington.[16] These statutes are notable as much for what they

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10. Lazarus v. Phelps, 152 U.S. 81, 85 (1894).

11. Buford v. Houtz, 133 U.S. 320, 326 (1890).

12. Light v. United States, 220 U.S. 523, 535 (1911).

13. MONT. CODE ANN. § 81-4-215 (1993). This statute is referred to as the "Montana Open Range Statute" throughout the text of this article.

14. ACTS, RESOLUTIONS AND MEMORIALS OF THE TERRITORY OF MONTANA, PASSED BY THE FIRST LEGISLATIVE ASSEMBLY § 1, at 351-52 (Bannack 1864) (current version at MONT. CODE ANN. § 81-4-215 (1993)).

15. MONT. CODE ANN. § 81-4-101 (1993).

16. Kobayashi v. Strangeway, 116 P. 461, 462 (Wash. 1911); Union Pac. Ry. Co. v. Rollins, 5 Kan. 98 (1869); Thomas L. Palmer, *Determining Liability of Ranchers and Farmers for Injuries Caused by Fencing or Not Fencing Rangelands*, 14 J. AGRIC.

Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 5

failed to do, as for what they did do. On their face the statutes forbid collection of damages from the owner of wandering livestock unless one had a "legal fence" around one's land. Significantly, these statutes did not declare a right to graze livestock on another person's land. Neither did they discuss any other remedies one might employ—such as injunctions, nuisance law, or self-help. Likewise, the statutes did not treat other issues that might arise—such as standards of care or highway problems. Compared to the broad custom they replaced, the open range statutes were facially quite narrow. This divergence left much room for judicial interpretation.

C. A Changing West Provokes Changing Range Laws

Well before the turn of the century, fundamental societal changes, primarily the increase in population and a change of attitude towards pastureland and farmland, were already undermining the rationale for the open range. Other changes included: the arrival of railroads capable of delivering fence posts to the prairies, the invention of barbed wire in the 1870's, and the iron windmill which could provide water to livestock nearly anywhere.[17]

By 1889, the law of the open range was under attack.[18] In 1894, in *Lazarus v. Phelps*,[19] the United States Supreme Court held that common law liability principles continued to apply, despite Texas' open range statute, where the defendant had stocked the range with more animals than his portion of the land would support. The Court construed the Texas Open Range Statute narrowly:

> The object of the statute . . . is manifest . . . . It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands, and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. *In other words, the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle* . . . . The ordinary rule that a man is bound to contemplate the natural and probable consequences of his

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TAX'N & L. 25, 27 (1992); Grossfeld, *supra* note 5, at 1517 n.47.

17. Grossfeld, *supra* note 5, at 1517.

18. Buford v. Houtz, 133 U.S. 320, 328 (1890).

19. 152 U.S. 81 (1894).

own act would apply in such a case.[20]

The *Lazarus* Court listed a variety of acts that would take a stock owner's actions outside the protection of the Texas Open Range Statute, including driving cattle upon another's lands, overstocking the range, and enclosing another's lands along with one's own.[21]

In essence, *Lazarus* established the principle that the common law remains intact, except to the extent it is modified by open range statutes. The Court interpreted the Texas Open Range Statutes as narrowly condoning only accidental trespass by livestock.[22] Other trespasses remained subject to common law remedies.[23] By the first decade of this century, most courts in open range states were either following the narrow-construction principle from *Lazarus*, or independently adopting it on their own.[24]

Soon after *Lazarus*, the gratuitous open range came to an end on most federal land. In 1897 forest reserve legislation commanded the responsible federal agency "to make such rules and regulations . . . as will insure the objects of such reservation . . . and to preserve the forests thereon from destruction."[25] The regulations adopted by the Secretary of Agriculture prohibited all but de minimis grazing on national forest reserves without paying for a grazing permit.

The federal regulations were challenged by Fred Light, a rancher who owned 540 acres of Colorado land near the Holy Cross Forest Reserve. He annually grazed 500 head of cattle on the unfenced range consisting of his ranch, the land around it, and the Reserve. The government sued to enjoin Light from turning out his cattle to wander on the Reserve. Light responded that Colorado's range statute gave him license to freely graze his

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20. *Lazarus*, 152 U.S. at 85 (emphasis added).

21. *Id.* at 85-86.

22. *Id.* at 85. The Texas open range statutes provided: "Every gardener, farmer, or planter shall make a sufficient fence about his clear land under cultivation at least five feet high, and make such fence sufficiently close to prevent hogs from passing through the same." TEX. REV. CIV. STAT. § 2431 (1840). "If it shall appear that the said fence is insufficient, then the owner of such [livestock] shall not be liable to make satisfaction for such damages." TEX. REV. CIV. STAT. § 2434 (1840).

23. *Lazarus*, 152 U.S. at 84-86.

24. Kobayashi v. Strangeway, 116 P. 461 (Wash. 1911); Jones v. Blythe, 93 P. 994 (Utah 1908); Bell v. Gonzales, 83 P. 639 (Colo. 1905); Martin v. Platte Valley Sheep Co., 76 P. 571 (Wyo. 1904); Monroe v. Cannon, 24 Mont. 316, 61 P. 863 (1900); Poindexter v. May, 34 S.E. 971 (Va. 1900); Union Pac. Ry. v. Rollins, 5 Kan. 98, 103-04 (1869). *See also* Robinson v. Kerr, 355 P.2d 117 (Colo. 1960).

25. Act of June 4, 1897, ch. 2, 30 Stat. 11, 35. (appropriations bill).

stock and that the forest regulations were void to the extent that they exempted federal lands from the open range laws of Colorado.[26]

In *Light v. United States*, the United States Supreme Court held that the federal government is not prohibited by the Colorado Open Range Statute from revoking the license to graze on federal land, whether the land is owned in either a sovereign or proprietary capacity.[27] In that the case the Court stated, "Fence laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another."[28] The Court interpreted Mr. Light's refusal to get a grazing permit, his statement that he would resist the removal of his cattle from the reserve, and his intention to continue "turning out his cattle" as beyond the protection of Colorado's open-range statute.[29] While the Court did not expressly require all users to acquire forest grazing permits, the holding is broader than it asserts. The Court upheld the grazing restrictions despite the absence of evidence that Mr. Light committed any sort of overt act of the kind proscribed in *Lazarus*.[30] Most significantly, the Court implicitly held, for the first time, that passive open-range grazing could create liability on unfenced land.

Since *Light*, grazing prohibitions on unfenced federal land have withstood every challenge. In *Shannon v. United States*,[31] the same 1897 federal legislation was at issue in Montana's Little Belt Mountains. The defendant argued that the Montana Open Range Statute justified his grazing. The Ninth Circuit reasoned that the Property Clause of the United States Constitution preempted any police power legislation of Montana that might otherwise apply:

> [Montana] could not give to the people of that state the right to pasture cattle upon the public domain, or in any way to use the same. Its own laws in regard to fencing and pasturing cattle at large must be held to apply only to land subject to its own dominion. No one within the state can claim any right in the

26. Light v. United States, 220 U.S. 525, 526 (1911).
27. *Id.* at 537 (citing *inter alia Lazarus*, 152 U.S. at 81, and Monroe v. Cannon, 24 Mont. 316, 61 P.2d 863 (1900)).
28. *Light*, 220 U.S. at 537.
29. *Id.* at 536-38.
30. *Lazarus*, 152 U.S. at 85-86; *see supra* text accompanying note 21.
31. 160 F. 870 (9th Cir. 1908).

public land by virtue of such a statute.[32]

Subsequently, the holdings of *Light* and *Shannon* were adopted in *United States v. Thompson*,[33] despite arguments that neither case was applicable unless the defendant willfully committed trespass upon federal land. The court in *Thompson* concluded that while state police power statutes might permit cattle on private lands to graze at large unless "fenced out," proprietary federal property rights entitle the United States to reverse that rule on federal land.[34] Consistent subsequent cases appear to settle the issue: The free "open range" in national forests and reserves is officially dead, state customs and statutes notwithstanding.[35]

Changes in grazing laws were also underway within open range states. Most state legislatures enacted herd district statutes that, by initiative of a local community, allowed the community to fully or partially revert to the common law inside the districts.[36] Many other types of statutes also reimposed common law fencing requirements in varying degrees and for various purposes in what had formerly been the open range.[37]

In addition, by the beginning of this century, most state courts were adopting the narrow-construction principle from *Lazarus* which held that open range statutes are effective only to modify, but not abolish common law liability.[38] The common law requires owners to "fence in" their livestock or else pay for resulting trespasses. Thereupon, western courts became engaged in the task of distinguishing protected activities under open range statutes from those subject to common law liability. For example, the Washington Supreme Court concluded that common law rules controlled where adjoining landowners jointly enclosed within an exterior boundary fence had not exercised their statu-

32. *Shannon*, 160 F. at 875.

33. 41 F. Supp. 13, 15 (E.D. Wash. 1941).

34. *Id.* at 15-16.

35. Bilderback v. United States, 558 F. Supp. 903 (D. Or. 1982); United States v. Holman, 247 F. Supp. 920 (E.D. Mo. 1965); United States v. Johnston, 38 F. Supp. 4 (S.D. W. Va. 1941); United States v. Gurley, 279 F. 874 (N.D. Ga. 1922).

36. *See, e.g.*, Easley v. Lee, 721 P.2d 215 (Idaho 1986); Lindsay v. Cobb, 627 P.2d 349 (Kan. Ct. App. 1981).

37. *See, e.g.*, Vanderwater v. Hatch, 835 F.2d 239 (10th Cir. 1987); Fuchser v. Jacobson, 290 N.W.2d 449 (Neb. 1980); Carver v. Ford, 591 P.2d 305 (Okla. 1979); Wenndt v. Latare, 200 N.W.2d 862 (Iowa 1972); Vangilder v. Faulk, 426 S.W.2d 821 (Ark. 1968); Poindexter v. May, 34 S.E. 971 (Va. 1900); Haigh v. Bell, 23 S.E. 666 (W. Va. 1895).

38. *See supra* note 24.

tory right to erect a partition fence between them.[39] The court awarded the plaintiff damages caused by defendant's trespassing livestock.[40]

For the last half-century, range issues in state courts have increasingly shifted from farmer/rancher litigation to motorist/rancher cases. These new-generation range cases typically involve claims for death or injury from vehicle accidents caused by livestock wandering onto highways.

Historically, the common law had provided a "public ways" exception to the fencing-in requirement for livestock. Unless the animals were known to possess "an unruly disposition," they were free to roam public roads at will.[41] Thus, in highway cases in western states these two different theories were effectively argued to justify judgments for defendant stockmen, both common law *and* open range law.[42]

As vehicle congestion increased, however, many state courts began to modify the common law, stating essentially, "There is no reason for exempting cattle owners from the same duty applicable to other people to use 'ordinary care or skill in the management of [their] property.'"[43] Thus, in many states the common law immunity was changed to reflect an ordinary negligence standard for stock owners—a trend increasingly followed throughout the United States.[44] Even most of the open range states now appear to require "ordinary due care" by owners of livestock with regard to the animals' presence on public highways.[45] In doing so, some courts expressly considered and rejected the applicability of their states' open range laws in vehicle-livestock collisions.[46] A few dissenting courts remain, but the

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39. Kobayashi v. Strangeway, 116 P. 461, 462 (Wash. 1911).

40. *Id.*; *see supra* note 24.

41. *See, e.g.*, Pelham v. Spears, 132 So. 886 (Ala. 1931).

42. *See, e.g.*, Bartsch v. Irvine Co., 149 Mont. 405, 427 P.2d 302 (1967).

43. Galeppi Bros. v. Bartlett, 120 F.2d 208, 210 (9th Cir. 1941) (quoting CAL. CIV. CODE § 1714).

44. George v. Perkins, 221 So. 2d 717 (Miss. 1969); Rice v. Turner, 62 S.E.2d 24 (Va. 1950); Bender v. Welsh, 25 A.2d 182 (Pa. 1942); Drew v. Gross, 147 N.E. 757 (Ohio 1925); James L. Rigelhaupt, Jr., Annotation, *Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting From Collision with Domestic Animal at Large in Street or Highway*, 29 A.L.R. 4th 431, 443-47 (1984).

45. *Galeppi Bros.*, 120 F.2d at 209 (applying California law); Carrow Co. v. Lusby, 804 P.2d 747 (Ariz. 1990); Grubb v. Wolfe, 408 P.2d 756 (N.M. 1965); Eixenberger v. Belle Fourche Livestock Exch., 58 N.W.2d 235 (S.D. 1953); Shepard v. Smith, 263 P.2d 985 (Idaho 1953); Summers v. Parker, 259 P.2d 59 (Cal. Ct. App. 1953); Jackson v. Hardy, 160 P.2d 161 (Cal. Ct. App. 1945).

46. *Carrow*, 804 P.2d at 750-54; *Grubb*, 408 P.2d at 758-60; *Galeppi Bros.*, 120

modern view that stock owners will be held to ordinary negligence duties seems to be most widely accepted.[47]

Although open range statutes remain on the books in many states, the circumstances justifying them have largely vanished in the dust of history. Erecting fences and watering stock in remote places is no longer impossible, and little chance remains of "wasting" uneaten grass. More significantly, most of the West is now in private or proprietary ownership with commensurate competing land uses. In light of these changes, legislative and judicial inroads have cut deeply into the open range. However, Montana's situation appears to be unique.

III. MONTANA RANGE LAW

A. *Before the Turn of the Century*

The early Montana Supreme Court briefly gave great deference to the concept of the open range.[48] In 1874, the court in *Smith v. Williams* interpreted the territorial Open Range Statute[49] to require complete enclosure as a prerequisite to receiving damages from trespassing stock.[50] The court insisted that a "legal fence" at the point of breach was insufficient.[51] Again, in 1889, the court affirmed a jury instruction under the Open Range Statute that if a defendant drove livestock onto plaintiff's unfenced land for pasture, *but did not do so with malice*, then the defendant must prevail in a damages action.[52]

By the close of the century, Montana's range was changing along with the rest of the country's. The 1895 legislature enacted various regulations and closures of the open range. These enactments categorically closed the range to "swine,"[53] and any "stud horse, ridgeling, or unaltered male mule or jackass over [eighteen] months . . . ."[54] The open range was closed to rams and

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F.2d at 210; *Jackson*, 160 P.2d. at 165.

47. *Compare Galeppi Bros.*, 120 F.2d at 209; *Carrow Co.*, 804 P.2d 747; *Grubb*, 408 P.2d 756; *Eixenberger*, 58 N.W.2d 235; *Shepard*, 263 P.2d 985; *Summers*, 259 P.2d 59; *Jackson*, 160 P.2d 161 *with George*, 221 So. 2d 717; *Rice*, 62 S.E.2d 24; *Bender*, 25 A.2d 182; *Drew*, 147 N.E. 757.

48. *See* Smith v. Williams, 2 Mont. 195 (1874).

49. ACTS, RESOLUTIONS AND MEMORIALS OF THE TERRITORY OF MONTANA, PASSED BY THE FIRST LEGISLATIVE ASSEMBLY § 1, at 351 (Bannack 1864) (current version at MONT. CODE ANN. § 81-4-215 (1993)).

50. *Smith*, 2 Mont. at 201.

51. *Id.*

52. Fant v. Lyman, 9 Mont. 61, 22 P. 120 (1889).

53. IV. THE CODES AND STAT. OF MONT. tit. XIV., § 1165 (1895).

54. IV. THE CODES AND STAT. OF MONT. tit. XIV., § 1163 (1895).

"he goat[s]" from August 1 to December 1.[55] Over the years, those types of restrictions multiplied. The following are all now forbidden to run at large in Montana: swine, sheep, llamas, alpacas, bison, goats,[56] "male equine animals,"[57] mixed-breed bulls, and bulls of any kind between December 1 and June 1.[58]

Over time the legislature has imposed many regulations on what was once the open range.[59] Herd district laws were enacted in 1917.[60] Owners or possessors of fifty-five percent of the land, not less than twelve square miles in size, must petition to create a district.[61] Allowing animals to run at large in a herd district is a misdemeanor.[62]

B. Open Range Cases From 1900 to 1960

Apace with a changing Montana, in 1900, the Montana Supreme Court criticized its 1889 *Fant* decision and expressly adopted the *Lazarus* principle, becoming one of the first state courts to do so.[63] *Monroe v. Cannon* applied common law strict liability principles to permit a landowner to seek damages from a sheepman who had herded his stock onto the plaintiff's land, saying:

> [A]ppellant contends that the provisions of [the Montana Open Range Statute] . . . negative the right to sue for damages, where the premises are not inclosed by a legal fence . . . . If appellant is correct, no man whose field, or pasture, or garden is not inclosed by a legal fence, is entitled to any protection under the law from the trespasses of any man who may desire to drive or herd his cattle or sheep upon it . . . . *The mistake appellant makes is in concluding that the [Montana Open Range Statute] . . . does not modify, but abrogates the rights existing under the common law.*[64]

In adopting the *Lazarus* principle, the Montana Supreme Court

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55. IV. THE CODES AND STAT. OF MONT. tit. XIV., § 1164 (1895).
56. MONT. CODE ANN. § 81-4-201 (1993).
57. MONT. CODE ANN. § 81-4-204 (1993).
58. MONT. CODE ANN. § 81-4-210 (1993).
59. *See generally* MONT. CODE ANN. §§ 81-4-201 to -220 (1993); MONT. CODE. ANN. §§ 76-16-101 to -415 (1993); *see also* 1939 Mont. Laws 554, § 26.
60. 1917 Mont. Laws 102 (current version at MONT. CODE ANN. §§ 81-4-309 to -328 (1993)).
61. MONT. CODE ANN. § 81-4-301 (1993).
62. MONT. CODE ANN. § 81-4-306 (1993).
63. Monroe v. Cannon, 24 Mont. 316, 324-26, 61 P. 863, 865-66 (1900).
64. *Id.* at 321-22, 61 P. at 864-65 (emphasis added).

applied an elementary rule of statutory construction—common law controls except when modified by statute.[65] The court held that deliberate herding of stock onto unfenced private lands was not within the scope of the Open Range Statute, and was not, therefore, insulated from common law strict liability.

Two years later, in *Beinhorn v. Griswold*,[66] the Montana Supreme Court broadened its interpretation of the *Lazarus* principle in light of the Open Range Statute. Beinhorn's cattle were grazing public range when they wandered onto Griswold's unfenced mining claim, drank from open containers of cyanide solution and, regrettably, died. At issue was the standard of care to be imposed on Griswold—was he entitled to treat the cattle as trespassers, licensees or invitees? Using the *Lazarus* principle, the court concluded that common law tort rules were not displaced by the Open Range Statute. Thus, the cattle were treated as trespassers:

> The owner is entitled to the exclusive possession of his land, whether fenced or not; and it is beyond the power of the legislature to prescribe, or of custom to create, a right in another to occupy the land or enjoy its fruits. Either written law or custom may withhold from the owner who does not fence his land a remedy for loss suffered by reason of casual trespasses by cattle which stray upon it, and may give a remedy for such trespasses to those only who inclose their land . . . . This is undoubtedly a legitimate exercise of the police power. It falls far short, however, of conferring a legal right to dispossess the nonfencing owner . . . . *The owners of domestic animals hold no servitude upon or interest, temporary or permanent, in, the open land of another, merely because it is open.*[67]

Starting with *Monroe* and *Beinhorn*, for the first sixty years of this century, the Montana Supreme Court conscientiously applied the *Lazarus* principle to open range issues. The court decided fifteen open range cases, using the common law rather than the Open Range Statute in ten of them.[68] In only two cas-

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65. MONT. CODE ANN. §§ 1-1-108-109, 1-2-103 (1993); O'Fallon v. Farmers Ins. Exch., 260 Mont. 233, 244, 859 P.2d 1008, 1015 (1993); State *ex rel.* La Point v. District Court, 69 Mont. 29, 33, 220 P. 88, 89 (1923); Finlen v. Heinze, 28 Mont. 548, 563-64, 73 P. 123, 126 (1903).

66. 27 Mont. 79, 69 P. 557 (1902).

67. *Id.* at 89, 69 P. at 558 (emphasis added).

68. Thompson v. Mattuschek, 134 Mont. 500, 333 P.2d 1022 (1959); Hill v. Chappel Bros. Inc., 93 Mont. 92, 18 P.2d 1106 (1932); Herness v. McCann, 90 Mont. 95, 300 P. 257 (1931); Long v. Davis, 68 Mont. 85, 217 P. 667 (1923); Dorman v. Erie, 63 Mont. 579, 208 P. 908 (1922); Chilcott v. Rea, 52 Mont. 134, 155 P. 1114

es did the court apply the Open Range Statute and insulate stock owners from liability.[69] Generally, the court's decisions carefully distinguished conduct prohibited under common law grazing rules from actions that were permitted by the Open Range Statute. In doing so, like other states' courts, the Montana Supreme Court increasingly tended to restrict the types of conduct permitted on the open range.

In 1912, the court expanded on *Monroe* by holding that one who deliberately herds stock on unfenced range does so "at his peril" with regard to the location of boundaries between his leased range and his neighbor's land.[70] In *Herrin v. Sieben*, the plaintiff owned land in checkerboard with the defendant's federally leased range. The evidence supporting the jury verdict showed that the defendant had "depastured substantially the whole area of plaintiff's lands, and that during this time he realized no benefit from them."[71]

In 1916, the common law liability imposed upon herders of stock was expanded a step further.[72] In *Chilcott v. Rea*, the defendants were herding sheep along a public road when nightfall forced them to bed down the sheep without food or water.[73] During the night the sheep broke through a fence and consumed $7,570 worth of the plaintiff's orchard. The defendants argued that "no right to recover for depredations of this sort can be based upon ordinary negligence, but the 'complaint must either show that the lands were inclosed with a legal fence, or that the trespass was the result of the willful, intentional act of the defendants.'"[74] The supreme court disagreed, stating:

> [W]here negligence is charged to the owner of such animals, and where it is claimed by him that the nonexistence of a legal fence was a factor in the control by him of such animals, the absence of a fence or its nonlegal character might be material

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(1916); Herrin v. Sieben, 46 Mont. 226, 127 P. 323 (1912); Musselshell Cattle Co. v. Woolfolk, 34 Mont. 126, 85 P. 874 (1906); *Beinhorn*, 27 Mont at 89, 69 P. at 558; Monroe v. Cannon, 24 Mont. 316, 61 P. 863 (1900).

69. Dunbar v. Emigh, 117 Mont. 287, 158 P.2d 311 (1945); Schreiner v. Deep Creek Stock Ass'n, 68 Mont. 104, 217 P. 663 (1923). Three cases were ultimately decided on collateral issues: Thompson v. Tobacco Root Coop., 121 Mont. 445, 193 P.2d 811 (1948); Rea Bros. Sheep Co. v. Rudi, 46 Mont. 149, 127 P. 85 (1912); Clemmons v. Gillette, 33 Mont. 321, 83 P. 879 (1905).

70. *Herrin*, 46 Mont. at 233, 127 P. at 327.

71. *Id.* at 229, 127 P. at 326.

72. *Chilcott*, 52 Mont. at 138, 155 P. at 1115.

73. *Id.* at 139, 155 P. at 1115.

74. *Id.* 138, 155 P. at 1115.

> upon the question of his negligence; but where animals are held in herd . . . and they invade such property through either *the willful act or the negligence* of their owner . . . such invasion is an actionable trespass, and the want of a legal fence is not material.[75]

Monroe, *Herrin*, and *Chilcott* established the principle that herding stock on unfenced land would give rise to common law damages if the injury resulted from a willful act, negligence, or an error in ascertaining ownership boundaries. Thereafter, the Montana Supreme Court began to impose common law liability on various other open range activities, even though no herding was involved.

In 1922, the court held that the Open Range Statute was intended only to avoid liability for stock running on the public range, but not to apply in disputes between adjoining owners whose lands are wholly enclosed from the public range.[76] In *Dorman v. Erie*, Mr. Erie's half-mile long fence was located thirty feet inside of the boundary line with his neighbor. Erie frequently opened the gate in this fence, thereby allowing his cattle to graze on the thirty-foot strip as well as his neighbor's adjoining pasture. The supreme court imposed liability on Eire, noting that *Monroe v. Cannon* "declared that the purpose of [the Open Range Statute] was to condone trespasses committed by animals lawfully running at large, and that the common-law rule is left otherwise unchanged."[77]

Then, in 1932, the court in *Hill v. Chappel Bros. Inc.*, expressly followed *Lazarus* and prohibited overstocking of the range.[78] In that case, the defendants and the plaintiffs had both leased vast tracts of open range on the Fort Belknap Indian Reservation. Defendants, however, ran several thousand more horses on the range than their share would support. The court concluded: "[F]ence laws do not furnish immunity to one who, in disregard of property rights, turns loose his cattle under circumstances showing that they were intended to graze upon the land of another."[79]

Likewise, in 1959, in *Thompson v. Mattuschek*, the court

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75. *Id.* at 138-39, 155 P. at 1115 (emphasis added).

76. Dorman v. Erie, 63 Mont. 579, 583-84, 208 P. 908, 909 (1922) (citing cases from the following open range states: Washington, Utah, Indiana and California).

77. *Id.* at 585, 208 P. at 909.

78. 93 Mont. 92, 101, 18 P.2d 1106, 1109 (1932).

79. *Hill*, 93 Mont. at 101, 18 P.2d at 1109 (citing Light v. United States, 220 U.S. 523, 527 (1910)).

held that tearing down the partition fence between neighbors was beyond the protection of the Open Range Statute where, as a result, defendant's cattle grazed on plaintiff's land.[80] Mattuschek's and Thompson's land was wholly enclosed by an external perimeter fence.[81]

Only two of the fifteen open range cases decided by the Montana Supreme Court between 1900 and 1960 invoked the immunities of the Open Range Statute.[82] In the first case, decided in 1923, the court explained that merely using line-riders for the general purpose of keeping cattle under control did not automatically impose common law liability for straying cattle.[83] The court ruled that to be held liable, the stockowner must act negli-

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80. 134 Mont. 500, 509, 333 P.2d 1022, 1027 (1959).

81. By statute in Montana, fences are of two basic kinds: personal and partition. Personal fences are built entirely on one persons property and at one's personal expense. Partition fences are built on, or as directly adjoining property boundaries as feasible (bluffs, perhaps interfering). *See* Montgomery v. Gehring, 145 Mont. 278, 400 P.2d 403 (1965). The expense of building and maintaining partition fences will, under certain circumstances, be shared. Regarding partition fences, any agreement between the parties controls. The statutes only apply if there is no agreement. *See Thompson*, 134 Mont. at 508, 333 P.2d at 1026.

Absent an agreement, statutes provide that the construction and maintenance of partition fences between neighbors, both of whom enclose their lands, shall be shared equally. MONT. CODE ANN. § 70-16-206 (1993). Likewise, where externally *fenced* lands are shared in common between adjoining landowners, and one owner wishes to end the common range, he can on six months notice, compel the adjoining owner to build half the fence or share half the cost of construction. MONT. CODE ANN. § 70-16-208 (1993).

Where the perimeter of the common pasture *is not fenced*, if one party fences his land, he may erect a partition fence between him and his neighbor. But the neighbor will not be required to pay for half, *unless and until* the neighbor chooses to fence his perimeter and thereby makes use of the partition fence previously erected. MONT. CODE ANN. § 70-16-207 (1993); *see, e.g.*, Sparks v. Halseth, 154 Mont. 395, 465 P.2d 100 (1970).

The reverse is also true. Where a partition fence divides properties, both of which are fenced on the perimeter, one party, on six months notice, may decide to remove his half of the partition fence, unless his neighbor buys him out. The buyout means paying half the value of the fence. MONT. CODE ANN. § 70-16-210 (1993). *This only works where the initiating neighbor also removes or destroys a substantial part of his perimeter fence. See* MONT. CODE ANN. § 70-16-207 (1993).

Where a legitimate partition fence exists, and the parties are jointly responsible for it, a neglect to repair by any party empowers his neighbor to repair it as his expense on 5 days notice or to replace it on 60 days notice. MONT. CODE ANN. § 70-16-209 (1993). Each landowner is responsible for maintaining the "right" half of the fence as he views it from his property. Where one owner's land is completely enclosed by the others, then they are each to maintain half of the fence to the right of the northeasterly corner as each views it. MONT. CODE ANN. § 70-16-205 (1993).

82. Dunbar v. Emigh, 117 Mont. 287, 158 P.2d 311 (1945); Schreiner v. Deep Creek Stock Ass'n, 68 Mont. 104, 217 P. 663 (1923).

83. *Schreiner*, 68 Mont. at 108-12, 217 P. at 664-66.

gently or willfully in causing the animals' presence on the plaintiff's land.[84]

Then, in 1945, the court held that when there was no evidence of willfulness or negligence, "the mere knowledge or expectation by one who turns cattle loose in a place where he has a right to release them that they may or probably will wander upon the lands of another . . . is not alone sufficient to constitute willful trespass."[85] The court interpreted the Open Range Statute to insulate such a defendant from injunctive relief as well as damages.[86] Notably, a substantial part of the defendant's land was wholly surrounded by the plaintiff's, and the court pointed out that the injunction remained valid to the extent that "there were willful acts or negligence on [defendant's] part in causing the livestock to enter plaintiff's lands."[87] Both *Schreiner v. Deep Creek Stock Ass'n* and *Dunbar v. Emigh* were careful to discuss and distinguish the application of the *Lazarus* principle.[88]

For sixty years, therefore, the Montana Supreme Court was largely consistent in its treatment of open range issues. Accidental trespass by livestock at large was insulated by the Open Range Statute from liability for damages. However, numerous other trespasses at common law were not insulated—herding of stock willfully, negligently, or in error as to land boundaries. In addition, overstocking, willful fence destruction and any turning loose of one's livestock "under circumstances showing that they were intended to graze upon the land of another"[89] were all subject to common law damages.

C. The Modern Court Adopts the Myth

The year 1964 marked a turning point for Montana range law. Thereafter, the Montana Supreme Court departed altogether from its careful scholarship that for six decades had maintained a balance between open range and common law principles. The change might be attributed to new members on the court. Also, by then issues of range law occupied less space on

84. *Id.*
85. *Dunbar*, 117 Mont. at 292, 158 P.2d at 313.
86. *Id.* at 294, 158 P.2d at 314.
87. *Id.* at 293, 158 P.2d at 314.
88. *Id.* at 291-94, 158 P.2d at 313-14; *Schreiner*, 68 Mont. at 109-12, 217 P. at 664-66.
89. Thompson v. Mattuschek, 134 Mont. 500, 508, 333 P.2d 1022, 1026-27 (1959) (quoting *Dunbar*, 117 Mont. at 291, 158 P.2d at 313).

the jurisprudential horizon which possibly produced less incentive for careful scholarship. For whatever reason, beginning in 1964, the Montana Supreme Court ceased even to consider the *Lazarus* principle in any of its decisions and embarked on what can fairly be described as a wholesale embrace of the western myth of the open range.[90]

Another change happened in the 1960's. As in other courts in the nation,[91] most Montana open range cases shifted to livestock accidents on highways[92] or other livestock tort situations.[93] Only one case considered a fairly traditional open range issue.[94]

In the first case of this era, decided in 1964, an electrical substation was fenced five feet inside the property boundary.[95] The power company sprayed a poisonous chemical along the base of the fence solely on its own land. The plaintiff's cattle, which were fenced into the adjoining field but not separated from the substation fence, died after consuming the poisoned grass. The supreme court affirmed a jury verdict on the basis of a duty to warn the cattle's owner. The court's opinion discussed neither the *Lazarus* principle nor common law tort principles (which arguably would have applied under the *Lazarus* principle). Instead, with a lengthy factual discussion, the court stated that defendant should be held to the standard of care of an "ordinary prudent person," and distinguished *Beinhorn v. Griswold* "on its facts."[96] The *Hopkins* decision could probably be justified under common law principles as holding that the plaintiff's cattle benefitted from an implied license to graze up to the substation fence,

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90. No Montana Supreme Court case after 1945 has cited either *Lazarus* or *Monroe*. *Compare infra* notes 92-93 *with Dunbar*, 117 Mont. at 292, 158 P.2d at 313. However, in 1959, the court discussed and applied the *Lazarus* principle, without citing it. *Thompson*, 134 Mont. at 508-09, 333 P.2d at 1026-27.

91. *See supra* note 44 and accompanying text.

92. Yager v. Deane, 258 Mont. 453, 853 P.2d 1214 (1993); Williams v. Selstad, 235 Mont. 137, 766 P.2d 247 (1988); Siegfried v. Atchison, 219 Mont. 14, 709 P.2d 1006 (1985); Ambrogini v. Todd, 197 Mont. 111, 642 P.2d 1013 (1982); Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 500 P.2d 397 (1972); Jenkins v. Valley Garden Ranch, Inc., 151 Mont. 463, 443 P.2d 753 (1968); Bartsch v. Irvine Co., 149 Mont. 405, 427 P.2d 302 (1967).

93. State *ex rel.* Martin v. Finley, 227 Mont. 242, 738 P.2d 497 (1987) (addressing livestock as a public nuisance); Hopkins v. Ravalli County Elec. Coop., 144 Mont. 161, 395 P.2d 106 (1964) (addressing premises liability).

94. Montgomery v. Gehring, 145 Mont. 278, 283, 400 P.2d 403, 406 (1965). Although the case principally involved boundary definitions in a deed, the Montana Supreme Court *sua sponte* added a discussion on open range fencing.

95. *Hopkins*, 144 Mont. at 163, 395 P.2d at 109.

96. *Id.* at 165, 395 P.2d at 108.

and therefore the plaintiff was owed the duties due to a licensee. The decision was so vague it is difficult to discern the court's reasoning.

In 1967, the court considered its first automobile/livestock collision case. The wife of the plaintiff was killed in an auto collision with a black horse that wandered onto the highway in open range at night.[97] The plaintiff argued that the defendant had a tort duty of ordinary "due care" arising from both common law and statute.[98] A $64,000 jury verdict for the husband was reversed in an opinion that quoted the *Smith*, *Beinhorn*, *Schreiner*, *Thompson*, and *Montgomery* cases for the general proposition "that Montana remains an open range state" and "the owner of livestock has no duty to prevent the livestock from wandering."[99] The Montana Supreme Court, therefore, held that the defendant had "no duty" in tort or otherwise to keep his horse off the highway.[100] The court did not further analyze open range issues. It made no comment on the holding of *Beinhorn* which applied the *Lazarus* principle.[101] Nor did the court note that *Schreiner* had been partly repudiated by *Herness*, precisely on the question of whether "negligence" removed a stock owner from the protection of the Open Range Statute.[102] Without mention or discussion, the court ignored the authorities cited by the plaintiff from the growing number of states that impose ordinary negligence duties on the owners of stock involved in highway crashes.[103]

Thereafter, in six subsequent highway cases the Montana Supreme Court reflexively cited and applied the *Bartsch* holding without further analysis of open range issues.[104] The court's opinions propounded wide generalities such as, "An open range designation implies that an owner is not liable for his wandering

97. Bartsch v. Irvine Co., 149 Mont. 405, 407, 427 P.2d 302, 303 (1967); Respondent's Brief at 1-2, 18-37, *Bartsch* (No. 11252).

98. *Bartsch*, 149 Mont. at 407, 427 P.2d at 303.

99. *Id.* at 407-409, 427 P.2d at 304-305.

100. *Id.* at 409, 427 P.2d at 305.

101. Beinhorn v. Griswold, 27 Mont. 79, 89-90, 69 P. 557, 558-59 (1902).

102. Herness v. McCann, 90 Mont. 95, 102, 300 P. 257, 259 (1931).

103. *See supra* note 45 and accompanying text; *see also* Respondent's Brief at 18-37, *Bartsch* (No. 11252).

104. Yager v. Deane, 258 Mont. 453, 458-60, 853 P.2d 1214, 1217-19 (1993); Williams v. Selstad, 235 Mont. 137, 139, 766 P.2d 247, 248 (1988); Siegfried v. Atchison, 219 Mont. 14, 16, 709 P.2d 1006, 1007 (1985); Ambrogini v. Todd, 197 Mont. 111, 119, 642 P.2d 1013, 1018 (1982); Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 78, 500 P.2d 397, 400 (1972); Jenkins v. Valley Garden Ranch, Inc., 151 Mont. 463, 465, 443 P.2d 753, 754-55 (1968).

livestock."[105] Most recently the court hailed, "[O]ur consistent refusal to impose a duty on . . . livestock owners relative to fencing livestock off roadways . . . ."[106]

In two highway cases, the court did rule favorably for plaintiffs injured by collisions with livestock. But in neither case did the court analyze the *Lazarus* principle nor otherwise integrate its decisions with earlier ones. In 1972, in *Sanders v. Mount Haggin Livestock*, the court concluded: "No one will dispute that Montana is an open range state. This Court has many times so ruled. But, as with every rule of law, definite exceptions do exist. The exception to the open range rule exists when the animals in question are in charge of herders."[107] Unfortunately, the court in *Sanders* apparently failed to comprehend either the source of the exception it applied,[108] or its scope.[109] Nor did the court correctly analyze the common law duties that consequently result.[110] At common law, even as modified by cases in majority courts, one is entitled to herd livestock on public roadways, but in doing so the herdsman must exercise due care.[111]

In 1982, the court again reflexively followed *Bartsch*, and pronounced Montana to be an open range state. However, the court reversed summary judgment for the defendant because a 1974 statutory amendment, that forbade the negligent release of livestock onto primary highways, gave rise to an issue of fact.[112] That statute was enacted in 1951 to forbid "willful" release of stock on fenced highways,[113] then amended to impose a negligence standard on the stock owner.[114] Even today, howev-

105. *Ambrogini*, 197 Mont. at 119, 642 P.2d at 1018.

106. *Yager*, 258 Mont. at 460, 853 P.2d at 1219.

107. 160 Mont. at 78, 500 P.2d at 400.

108. Monroe v. Cannon, 24 Mont. 326, 61 P. 863 (1900) *following* Lazarus v. Phelps, 152 U.S. 81 (1893); *see supra* note 63 and accompanying text.

109. *Sanders*, 160 Mont. at 78, 500 P.2d at 400. *Sanders* suggests that any animals in the charge of herders are within the exception, even though Schreiner v. Deep Creek Stock Ass'n., 68 Mont. 104, 217 P. 663 (1923), and Herness v. McCann, 90 Mont. 95, 300 P. 257 (1931), hold otherwise, depending on circumstances.

110. *Sanders*, 160 Mont. at 78, 500 P.2d at 400.

111. *See supra* note 45 and accompanying text.

112. Ambrogini v. Todd, 197 Mont. 111, 119-21, 642 P.2d 1013, 1018-19 (1982) (citing MONT. CODE ANN. §§ 60-7-201 to -202 (1993)).

113. 1951 Mont. Laws 157-58 (codified as amended at REV. CODE MONT. § 32-1018 (1947) (superseded)) (crime of using United States highways for pasturage or running of livestock).

114. 1974 Mont. Laws 872 (codified as amended at REV. CODE MONT. § 32-21-176 -177 (1974) (superseded) (current version at MONT. CODE ANN. § 60-7-201 (1993)) (revision of laws relating to the department of highways).

er, the statute is subject to broad exclusions,[115] and the legislature, perhaps well-representing its ranching constituency, has put most of the burden for fencing highways onto the state.[116] These legislative changes, even though significant, do not address a myriad of situations; such as liability for escaping stock, city and county road issues, and ordinary nuisance.

In 1987, the Montana Supreme Court considered one of these issues in a case brought by the Mineral County Attorney for statutory public nuisance against stock owners whose animals were roaming at will on public roads and private land.[117] The court quashed an injunction against the stock owners. Once again, the court reflexively followed *Bartsch* and refused to apply the public nuisance statute in the face of the open range custom.[118] The court made no mention of *Lazarus*, *Monroe*, or the Open Range Statute itself.[119]

A more scholarly opinion would have affirmed the district court. For example, the supreme court could easily have reconciled the two seemingly inconsistent statutes since the Open Range Statute forecloses only "damages." The Open Range Statute says nothing about preempting other statutory remedies such as nuisance. Alternatively, the court could have applied the *Lazarus* principle to affirm the injunction as a legitimate exercise of public nuisance law—a common law set of principles that survive the Open Range Statute.

IV. CONCLUSION

The open range remains a charming myth of the old West. But Montana has changed since the enactment of the Open Range Statute 130 years ago. The Montana Supreme Court so declared in *Ambrogini* in 1982, saying, "The open range tradition has become increasingly eroded over the years as a greater number of motorists have appeared on Montana's roads and highways."[120] Similarly, in a 1967 plaintive concurrence, Justice John C. Harrison cried out for changes to the open range

115. MONT. CODE ANN. § 60-7-202 (1993).

116. MONT. CODE ANN. §§ 60-7-101 to -103 (1993) (requiring the Department of Transportation to erect fences in most new or reconstructed areas of the state highway system).

117. State *ex rel.* Martin v. Finley, 227 Mont. 242, 245, 738 P.2d 497, 499 (1987).

118. *Id.*

119. MONT. CODE ANN. § 81-4-215 (1993).

120. Ambrogini v. Todd, 197 Mont. 111, 119, 642 P.2d 1013, 1018 (1982).

law of Montana.[121] Still, the modern supreme court has all but abdicated power on open range questions by reflexively repeating the myth. In so doing, the court abandons the issue to the legislature's periodic tinkering.

Today, however, public policy needs reason rather than romance. Motorists are maimed or die in collisions with livestock whose owners are not required to fence them off highways.[122] Roaming livestock belonging to a single owner can create a public nuisance for an entire community.[123] These situations need not be condoned by law. The Montana Supreme Court should return to its historically narrow construction of open range law by re-embracing its own sixty years of authority from 1900 to 1960. The court should follow the lead of other western state courts that impose a duty of ordinary care on stockowners.

Unfortunately, since 1964, the Montana Supreme Court's unequivocal embrace of the open range concept makes it doubtful the court will be receptive to a revival of the *Lazarus* principle from *Monroe v. Cannon*. Doing so would require the court to limit, criticize, or outright overrule many recent decisions.[124] Nonetheless, the court has corrected its errors in the past;[125] the court should do so again.

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121. Bartsch v. Irvine Co., 149 Mont. 405, 410-11, 427 P.2d 302, 305 (1967) (Harrison, J., concurring).

122. *See, e.g.*, Yager v. Deane, 258 Mont. 453, 853 P.2d 1214 (1993); *Bartsch*, 149 Mont. 405, 427 P.2d 302.

123. *See, e.g.*, State *ex rel.* Martin v. Finley, 227 Mont. 242, 738 P.2d 497 (1987).

124. Williams v. Selstad 235 Mont. 137, 766 P.2d 247 (1988); *State ex rel. Martin*, 227 Mont. 242, 738 P.2d 497; Siegfried v. Atchison, 219 Mont. 14, 709 P.2d 1006 (1985); Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 500 P.2d 397 (1972); Jenkins v. Valley Garden Ranch, Inc., 151 Mont. 463, 443 P.2d 753 (1968); *Bartsch*, 149 Mont. 405, 427 P.2d 302.

125. With regard to determining titles in navigable rivers, for purposes of distinguishing the doctrines of avulsion from accretion and reliction, the Montana Supreme Court redefined the term avulsion consistently with other authorities and repudiated its earlier holding. Montana Dep't of State Lands v. Armstrong, 251 Mont. 235, 238, 824 P.2d 255, 257-58 (1992) (criticizing McCafferty v. Young, 144 Mont. 385, 397 P.2d 96 (1964)).